



August 24, 2011

Via <https://ftpublic.commentworks.com/ftc/unavailabilityruleanpr>

Donald S. Clark
Secretary to the Federal Trade Commission
Room H-113 (Annex N)
600 Pennsylvania, Avenue NW
Washington, DC 20590

Dear Secretary Clark:

RE: 16 CFR Part 424 -- Retail Food Store Advertising Rule, Project No. P104203

This letter presents comments of The Heritage Foundation¹ ("Foundation") on the Advanced Notice of Proposed Rulemaking on "Retail Food Store Advertising and Marketing Practices Rule" published by the Federal Trade Commission (FTC) (76 *Fed. Reg.* 51308, August 18, 2011). The referenced rule, commonly called the "Unavailability Rule," prohibits retail food stores in certain circumstances from advertising products that are not available in the stores. In its request for comments, the Commission asked, "Is there a continuing need for the Rule? Why or why not?" and said "Provide any evidence concerning whether any of the Rule's provisions are no longer necessary. Explain why these provisions are unnecessary." 76 *Fed. Reg.* 51309. For the reasons set forth below based on market competition and federalism principles, the Foundation recommends revocation of the Unavailability Rule.

The Unavailability Rule

The advertising prohibition in the Unavailability Rule applies to retail food stores in connection with offering or selling merchandise in or affecting interstate or foreign commerce. The rule prohibits the stores from advertising a product for sale at a stated price, if the stores do not have the advertised product in stock and readily available to customers during the effective period of the advertisement, unless the advertisement discloses that supplies are limited or available only at some outlets. 16 CFR §424.1. The rule also contains defenses against finding a violation of the prohibition if the store ordered the advertised products in adequate time for delivery in quantities sufficient to meet reasonably anticipated demand; offered "rainchecks" for the advertised product; offered a similar product comparable in value at the advertised price or less; or offered compensation at least equal to the advertised value. 16 CFR §424.2.

¹ The Foundation is a District of Columbia nonprofit corporation that is recognized as exempt under section 501(c)(3) of the Internal Revenue Code, with the mission "to formulate and promote conservative public policies based on the principles of free enterprise, limited government, individual freedom, traditional American values, and a strong national defense." The Foundation submits these comments as permitted by law (5 U.S.C. 553(c), 2 U.S.C. 1602(8)(B)(x), and 26 U.S.C. 4911(d)(2)(E)).

No-one would condone the commercial conduct prohibited by the Unavailability Rule. Federal government action is not, however, the only or best means for discouraging such conduct. Given the role of the market competition in the American economy, and the traditional role of the States in our federal system, the Foundation recommends that the Commission revoke the Unavailability Rule and allow market competition, and to the extent necessary the governments of the several States, to protect consumers against the risk of retail food store advertising of unavailable products.

Market Competition Can Police the Retail Grocery Industry

The retail grocery industry is a highly competitive industry.² Competition has expanded substantially in the retail grocery industry since the FTC originally adopted the rule in 1971 and since the rule was amended in 1989. There are 92,300 grocery stores in America.³ Of those grocery stores, Wal-Mart operates 3,122,⁴ The Kroger Company operates 2,460,⁵ Supervalu, Inc. (including Albertson's) operates 2,394,⁶ Safeway, Inc. operates 1,694,⁷ and Publix Supermarkets, Inc. operates 1,034.⁸ The Great Atlantic & Pacific Tea Company, Inc., which was one of the two largest grocery store chains in America in 1975, when it operated over 3,600 stores,⁹ is in reorganization under the Bankruptcy Code and now operates 395 stores, showing what can happen in this competitive industry to grocery store companies that do not meet the demands of customers.¹⁰

² *Benefield v. Food Giant*, 630 F. Supp 78, 81 (M.D. Georgia 1985), *affirmed* 792 F. 2d 1125 (11th Cir. 1986).

³ *Statistical Abstract of the United States for 2011* (Table 1047, for 2007). The number of farmers markets also has increased substantially in recent years. In 1994, the U.S. had 1,755 farmers markets; in 2011 it had 7,175. U.S. Department of Agriculture, Agricultural Marketing Service, "Number of Operating Farmer Markets," at <http://www.ams.usda.gov/AMSV1.0/ams.fetchTemplateData.do?template=TemplateS&leftNav=WholesaleandFarmersMarkets&page=WFMFarmersMarketGrowth&description=Farmers%20Market%20Growth&acct=fmrdirnkt> (last modified date August 8, 2011) (visited August 24, 2011).

⁴ <http://walmartstores.com/AboutUs/7606.aspx> (visited August 19, 2011).

⁵ The Kroger Co., Annual Report to the Securities and Exchange Commission (Form 10-K) for the fiscal year ending January 2011, Item 1.

⁶ Supervalu, Inc., Annual Report to the Securities and Exchange Commission (Form 10-K) for the fiscal year ending February 2011, Item 1.

⁷ Safeway, Inc., Annual Report to the Securities and Exchange Commission (Form 10-K) for the fiscal year ending January 1, 2011, Item 1.

⁸ Publix Supermarkets, Inc., Annual Report to the Securities and Exchange Commission (Form 10-K) for the fiscal year ending December 25, 2010, Item 1.

⁹ *In the Matter of the Great Atlantic & Pacific Tea Company, Inc.*, 85 F.T.C. 601, 1975 WL 173162 (1975), paras. 1, 5 and 6.

¹⁰ Sam Martin, President and Chief Executive Officer, Letter to Valued Customers (December 12, 2010) at <http://aptea.com/pdf/CEO%20Customer%20letter%20FINAL.pdf> (visited August 19, 2011).

Most people in America live near a grocery store -- the median distance to a grocery store for an American is less than a mile¹¹ -- and some in America live near multiple grocery stores.¹² Only 2.3 percent of American households are further than a mile from a supermarket and lack access to a vehicle.¹³ Grocery stores have many customers and those customers often have choices about where to shop for groceries.

Under these circumstances -- a highly competitive industry in which many customers have choices about where to shop -- market competition clearly can police against any grocery businesses that advertise products that they do not have for sale at the advertised price. As then-FTC Commissioner Terry Calvani, dissenting when the rule was amended in 1989, said, "any supermarket that frustrates its customers through unavailability of advertised items will not long keep those customers." Commissioner Calvani stated in full:

I dissent from the Commission's decision today to amend the Retail Food Store Advertising and Marketing Practices Trade Regulation Rule (the Unavailability Rule). The Commission has acknowledged today that the original Unavailability Rule is not justified, and approved amendments designed to lower its costs to grocers. However, in my view, common sense tells us that in the highly competitive grocery store business, where consumers return week after week to the same store, any supermarket that frustrates its customers through unavailability of advertised items will not long keep those customers. In other words, it is clear to me that existing market forces adequately police unavailability, and that, therefore, no Federal Trade Commission rule is necessary, amended or otherwise. The Commission's action today to retain even an amended Unavailability Rule does not conform to common sense.

With the retail grocery business substantially more competitive today than it was when the FTC adopted and amended the Unavailability Rule, the FTC can and should repeal its rule, and rely instead upon market forces to deter the conduct addressed by the Unavailability Rule.

¹¹ Economic Research Service, U.S. Department of Agriculture, "Access to Affordable and Nutritious Food: Measuring and Understanding Food Deserts and Their Consequences," Chapter 2, Table 2.2, p. 19, available at <http://www.ers.usda.gov/Publications/AP/AP036/AP036b.pdf> (visited August 19, 2011).

¹² For example, a study of 204 Boy Scouts from 36 troops in the greater Houston, Texas area showed that there was an average of 1.3 supermarkets and 7.3 small food stores within a 1 mile radius of home, and the average distance to the nearest small food store was 778 meters. Russell Jago, Tom Baranowski, Janice C. Baranowski, Karen W. Cullen, and Debbe Thompson, "Distance to Food Stores & Adolescent Male Fruit and Vegetable Consumption: Mediation Effects," *International Journal of Behavioral Nutrition and Physical Activity* 2007, 4:35 (September 13, 2007), available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2014759/> (visited August 19, 2011).

¹³ Economic Research Service, U.S. Department of Agriculture, "Access to Affordable and Nutritious Food: Measuring and Understanding Food Deserts and Their Consequences," Chapter 2, p. 20, available at <http://www.ers.usda.gov/Publications/AP/AP036/AP036b.pdf> (visited August 19, 2011).

The States Can Fill Any Void in Consumer Protection Against Grocery Advertisement of Products Not Available for Sale at the Advertised Price

While market competition deters against any risk that retail grocery stores will advertise products they do not have for sale at the advertised price, if the FTC remains concerned that isolated instances of such conduct might yet occur, the FTC can draw further assurance from the existence today of consumer protection agencies in all 50 State governments, to which any consumer could turn with reports of a grocery store advertising products that it does not have for sale at the advertised price.¹⁴

Section 2 of Executive Order 13132 on Federalism¹⁵ identifies as fundamental federalism principles that "issues that are not national in scope or significance are most appropriately addressed by the level of government closest to the people," "our constitutional system encourages a healthy diversity in the public policies adopted by the people of the several States according to their own conditions, needs, and desires," and "national government should be deferential to the States when taking action that affects the policymaking discretion of the States." Although the President did not bind the Federal Trade Commission to these principles, the President encouraged the Commission to follow them.¹⁶

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For the reasons given above based on market competition and federalism principles, the Foundation urges the Federal Trade Commission to revoke Part 424 of title 16 of the Code of Federal Regulations.

Sincerely,

David S. Addington

Vice President for Domestic and Economic Policy

¹⁴ A full listing of the consumer protection organizations of the 50 State governments is available at <http://www.usa.gov/directory/stateconsumer/index.shtml> (visited August 19, 2011). States have the authority to enact laws to prohibit advertising of products that are not available for sale at the price advertised. See, for example, the Colorado Consumer Protection Act, Colorado Revised Statutes §6-1-105; the New Jersey Consumer Fraud Act, New Jersey Statutes Annotated §56:8-2.2; the Texas Business and Commerce Code Annotated §17.41; and the Washington Consumer Protection Act, Revised Code of Washington Annotated §19.86.020.

¹⁵ Executive Order 13132, "Federalism," 64 *Fed. Reg.* 43255 (August 4, 1999).

¹⁶ Section 10 of Executive Order 13132 ("Independent regulatory agencies are encouraged to comply with the provisions of this order.")